

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 01-455-A
)	
ZACARIAS MOUSSAOUI)	

**MOTION FOR DISCOVERY OF AGREEMENT BETWEEN GERMANY, FRANCE
AND THE UNITED STATES AND EVIDENCE SUBJECT
AND/OR RELEVANT TO THAT AGREEMENT¹**

Standby counsel, on behalf of Zacarias Moussaoui, pursuant to Rule 16 of the Federal Rules of Criminal Procedure and *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, move this Court to enter an order requiring the United States to provide all information responsive to the following requests. It is respectfully submitted that the information requested herein is material to the defense as set forth below and is in the possession, custody, or control of the United States:

- A. Any agreement between the United States and Germany regarding the production of evidence related in any way to this prosecution.
- B. Any letters rogatory from the United States seeking evidence from Germany for use in this prosecution.
- C. Any agreement between the United States and France regarding the production of evidence related in any way to this prosecution.
- D. Any letters rogatory from the United States seeking evidence from France for use in this prosecution.

¹ Pursuant to the Court's August 22, 2002 order, a copy of this motion was provided to Mr. Moussaoui for his review before the motion was filed.

- E. Any correspondence that relates to any of the evidence or other information responsive to requests A through D.
- F. The evidence that has been produced by France or Germany in response to any of the letters rogatory, agreements, or correspondence referenced in requests A through E.
- G. Any oral or written agreement or understanding that limits or seeks to limit the use of any evidence produced by France or Germany in this prosecution so that such evidence may not be used to seek or obtain the death penalty against the defendant.

The Agreement Between Germany, France And The United States

On Wednesday, November 28, 2002, the media reported that the governments of Germany, France and the United States had reached an agreement regarding the delivery of evidence from Germany and France to the United States for use in the prosecution of Mr. Moussaoui. See, e.g., Dan Eggen, *U.S. to Get Moussaoui Data From Europe*, Wash. Post, Nov. 28, 2002, at A19 (“French and German authorities have agreed to turn over documents relating to terror suspect and French national Zacarias Moussaoui, after being assured by the Justice Department that the evidence will not be used to seek or impose the death penalty, officials said yesterday.”);² Larry Margasak, *Germany, France Agree to Cooperate in Moussaoui Case*, Assoc. Press, Nov. 28, 2002 (same). Apparently, the agreement contemplates that none of the evidence will be used directly or indirectly to impose the death penalty on Mr.

² A copy of this article is appended.

Moussaoui. As the German Embassy reportedly stated, “[t]he United States of America has assured [us] that the evidence and the information submitted by Germany will not directly or indirectly be used against the defendant nor against a third party towards the imposition of the death penalty.” Dan Eggen, *U.S. to Get Moussaoui Data From Europe*, Wash. Post, Nov. 28, 2002, at A19 (quoting the German Embassy in Washington, D.C.).

On December 2, 2002, standby counsel wrote to the U.S. government requesting production of the “agreement” with the German and French governments. See letter to AUSA Robert Spencer from Edward MacMahon, Jr. dated December 2, 2002, appended hereto. The government refused this request later the same day. See letter to Edward MacMahon, Jr. from AUSA Robert Spencer dated December 2, 2002, appended hereto. Specifically, the government said that the defense was “not entitled to any such agreement,” and that neither Mr. Moussaoui nor his standby counsel “have standing to contest or enforce any such agreement.” *Id.* As for the documents subject to the agreement, the government merely noted that it would produce same only if the documents were intended to be used at trial or were “otherwise discoverable.” *Id.*

The Agreement And The Documents Subject Thereto Must Immediately Be Produced And Identified

The agreement, and the other evidence requested above, between the German government, the French government and the United States must be produced. This agreement, and the evidence turned over pursuant thereto, are both “within the government’s possession, custody, or control,” and “material to preparing the defense.” Fed. R. Crim. P. 16(a)(1)(E). Further, this evidence does not constitute a statement of

a prospective government witness or other evidence that is not subject to production. See *id.* at 16(a)(2).

More particularly, as to materiality, if the agreement with Germany and France contains the language reported above, then that agreement constitutes a binding stipulation as to the use of certain evidence in this case. This agreement, *qua* stipulation, specifically addresses, was prepared for, and will govern the use and admissibility of key evidence in this case. As such, Mr. Moussaoui should be able to examine the requested material to determine what actions, if any, he should take before or during trial regarding the evidence that is subject to this stipulation.³

Moreover, Mr. Moussaoui is free to argue, in any death penalty phase, that based on the agreement with Germany and France, certain key evidence used to obtain his conviction is not to be used to impose the death penalty. See *United States v. Bin Laden*, 156 F. Supp. 2d 359, 368-71 (S.D.N.Y. 2001) (allowing a capital defendant to present during the penalty phase of his trial the holding of the Constitutional Court of South Africa that the South African government should have sought assurances from the U.S. government that the defendant would not receive the death penalty). This argument is plainly permissible as a statutory and/or non-statutory mitigator and is powerful evidence that the governments of France and Germany not only do not want to have any part in the execution of Mr. Moussaoui, but also that they believe that such a punishment is inappropriate. That argument would be impossible to present if the

³ To the extent that the government claims that Mr. Moussaoui has no standing to enforce these agreements, that claim should be rejected as premature, as, at this point, all that standby counsel seek is production of the agreement and related documents.

actual agreement and a detailed description of the evidence subject to that agreement were not available to standby counsel, Mr. Moussaoui, and the jury. As such, the evidence and relief sought herein is, at a minimum, *Brady* material in the penalty phase of this case. See *United States v. Beckford*, 962 F. Supp. 804, 811 (E.D. Va. 1997) (Payne, J.) (noting that at the pre-trial stage, “the defendant[] need only establish a ‘substantial basis for claiming’ that a mitigating factor will apply at the penalty phase, in order to invoke the Government’s obligation under *Brady* and its progeny to produce any evidence which is material to that mitigating factor”).

Finally, public policy also requires that the defense know precisely what evidence exists that is covered by this agreement. Certainly the United States desires that the governments of Germany and France know that the United States considers sacrosanct its obligations and agreements. By identifying this evidence, and by giving notice when such evidence is introduced, that policy is advanced. Moreover, this evidence can be identified by the U.S. prosecutors without much difficulty. Any item of evidence that has been received pursuant to the terms of the agreement can easily be identified as such so that the defendant, the Court and the jury will know when such evidence is offered. In the event that the agreement is violated by the United States, or if the agreement cannot be enforced as a matter of law or practicality,⁴ the defense may then seek to

⁴ Standby counsel do not understand how this agreement can actually be implemented. Once the evidence is introduced in the guilt phase, *ipso facto* it will be considered by the jury in the penalty phase. This is because the jury that determines guilt is the same jury that determines punishment and hence, if there is a penalty phase, the jurors can consider any “guilt” evidence in deciding the issue of death. Thus, despite what the German and French governments apparently have been told, no circumstance exists whereby the evidence “will not directly or indirectly be used against the defendant . . . towards the imposition of the death penalty.” See Dan Eggen, *U.S. to Get Moussaoui Data From Europe*, Wash. Post, Nov. 28, 2002, at A19 (quoting a statement from the German Embassy in Washington, D.C. relating the German government’s understanding of the agreement).

exclude the evidence at that time. But first, the agreement and the related documents must be produced so that the scope and implications of the agreement may be ascertained.

CONCLUSION

Accordingly, for the foregoing reasons and any others adduced at a hearing on this motion, standby counsel move this Court to order the government to immediately produce to Mr. Moussaoui and standby counsel the material referenced herein.

Respectfully submitted,

ZACARIAS MOUSSAOUI
By Standby Counsel

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion for Discovery of Agreement Between Germany, France and the United States and Evidence Subject and/or Relevant to that Agreement was served upon AUSA Robert A. Spencer, AUSA David Novak and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, by placing a copy BY HAND in the box designated for the United States Attorney's Office in the Clerk's Office of the U.S. District Court for the Eastern District of Virginia and UPON APPROVAL FROM THE COURT SECURITY OFFICER via first class mail to Zacarias Moussaoui, c/o Alexandria Detention Center, 2001 Mill Road, Alexandria, VA 22314 this 13th day of December 2002.

Edward B. MacMahon, Jr.